



Commonwealth of Kentucky  
Finance and Administration Cabinet  
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**Steven L. Beshear**  
Governor

**Jonathan Miller**  
Secretary

June 8, 2010

**No. 10-02**

Greg Brendel  
V-Soft Consulting Group, Inc.  
12305 Westport Road, Suite 110  
Louisville, KY 40245

RE: Determination of Protest: RFP 758 1000000001 (IT System Design/Development Services).

Dear Mr. Brendel

The Finance & Administration Cabinet (the "Finance Cabinet") is in receipt of your letter of protest on behalf of V-Soft Consulting Group, Inc. ("V-Soft") to the award of RFP 758 1000000001 for IT System Design/Development Services (the "RFP"). For the reasons stated herein, this protest is denied.

### **FACTUAL BACKGROUND**

The Finance Cabinet, Office of the Controller, Office of Procurement Services ("OPS") issued the RFP on July 1, 2009. The RFP closed on August 19, 2009. The purpose of the RFP was:

This Request for Proposal (RFP) is being issued to establish up to four (4) Commonwealth Office of Technology (COT) contracts for Information Technology (IT) System Design/Development Services.

RFP, Section 10.000. The RFP required a Technical Proposal and a Cost Proposal, RFP, Section 50.130. The Commonwealth reserved the right to request Oral Presentations. RFP, Section 80.000.

V-Soft submitted a proposal. On January 13, 2010, after oral presentations and evaluation, OPS awarded contracts to Keane, Pomeroy IT Solutions, and TEKsystems.

On January 20, 2010, V-Soft filed a protest of the award. In its written protest, V-Soft argues that it had the lowest pricing. By letter dated January 27, 2010, V-Soft stated that it would supplement its protest upon receipt of documents requested in an Open Records request. By letter dated February 12, 2010, V-Soft stated five further grounds of protest.

## DETERMINATION

After a review of the solicitation, the applicable statutes and regulations, and other relevant information, the Secretary of the Finance and Administration Cabinet (the "Secretary") finds and determines as follows:

Any actual or prospective bidder who is aggrieved in connection with the solicitation or selection for award of a contract may file a protest with the Secretary of the Finance Cabinet. KRS 45A.285. V-Soft submitted a proposal in response to the RFP. Therefore, V-Soft has standing to protest the award of the RFP.

A protest must be filed promptly and, in any event, within fourteen (14) calendar days after the aggrieved person *knows or should have known* of the facts giving rise thereto. KRS 45A.285(2). For purposes of computing the fourteen (14) calendar day deadline for the submission of a protest, the following legal presumptions apply:

(a) For protests based upon alleged improprieties in a solicitation for bids or proposals which relate to the solicitation documents themselves, the facts giving rise to the protest shall be presumed to have been known to the protester on the date the solicitation, or a modification to it, was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1) (a).

(b) For protests based upon alleged improprieties in the award of a contract, the facts giving rise to the protest shall be presumed to have been known to the protester on the date the contract award was posted to the Commonwealth of Kentucky's eProcurement web site. 200 KAR 5:380 (1).

A legal presumption is a fact assumed from the specific circumstances. The legal presumption in this case may be overcome upon presentation of evidence showing that the facts giving rise to the protest were not and could not have been known to the protester on the date presumed by the regulation. 200 KAR 5:380 (1).

Here, the award was made on January 13, 2010. The initial protest was received on January 20, 2010. The initial protest letter was timely. V-Soft received documents relating to the procurement requested pursuant to an Open Records request. The supplemental protest was dated February 12, 2010. The Secretary finds that V-Soft has overcome the presumption of 200 KAR 5:380(1)(a) since it could not have known of the alleged errors before receipt of information obtained by its Open Records request. The supplemental protest letter was filed within two calendar weeks and is, accordingly, timely.

This procurement was conducted under "competitive negotiation" procedures at KRS 45A.085. The hallmark of "competitive negotiation" is discretion. A Request for Proposals or RFP is utilized for "competitive negotiation" under KRS 45A.085. Under the "competitive negotiation" scheme, a contract may be awarded "to the responsible offeror whose proposal is determined in writing to be the most advantageous to the Commonwealth, taking into consideration price and the evaluation factors set forth in the request for proposals." KRS 45A.085(6).

The award of a negotiated procurement is a discretionary act by an agency. *See Laboratory Corp. of America Holdings v. Rudolph*, 4 S.W.3d 68, 75 (Ky.App. 2005); *Hensley v. City of Russell*, 2006 WL 2988174 (the award of a public contract is a purely discretionary act). In addition, the Kentucky Model Procurement

Code creates a presumption of correctness for agency decisions. KRS45A.280. The limits of “discretion” are not boundless, however; agency actions that are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law will be overturned. *See Commonwealth of Kentucky v. Yamaha*, 237 S.W.3d 203, 206 (Ky. 2007).

Therefore, the protestor has the burden to show that the agency's actions were either without a reasonable basis or in violation of applicable procurement law. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). The Secretary will not “substitute [his] judgment ... for that of the agency, but [will] intervene only when it is clearly determined that the agency's determinations were irrational or unreasonable.” *Baird Corp. v. United States*, 1 Cl.Ct. 662, 664 (1983). If the agency shows that there was a reasoned basis for its decision, the award must be upheld. *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974); *CRC Marine Servs., Inc. v. United States*, 41 Fed.Cl. 66, 83 (1998).

In addition to showing that the agency's action was arbitrary or capricious or otherwise inconsistent with law, a protestor must show that the agency's action was prejudicial. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1562 (Fed.Cir.1996) (“[T]o prevail in a protest the protestor must show not only a significant error in the procurement process, but also that the error prejudiced it.”). To show prejudice, the protestor must demonstrate that there is a reasonable likelihood that, absent the error or violation of law, it would have been awarded the contract. *Alfa Laval Separation, Inc. v. United States*, 175 F.3d 1365, 1367 (Fed.Cir.1999).

Accordingly, the Secretary will review the agency's determination to determine whether there was a rational basis for its evaluation and whether the evaluation was consistent with applicable law. If the Secretary finds error, the Secretary will then examine whether the error was prejudicial to the protestor.

Applying these general rules to V-Soft's specific grounds of protest, the Secretary finds as follows:

- A. “All three awardees have received exact same # of points (948) for Oral Presentation portion of the RFP. It was found that one of the winners scores were added incorrectly.”**

Identical scores, without more, do not establish an arbitrary or capricious evaluation. The allegation of a mathematical error does not establish an arbitrary or capricious evaluation. It is the burden of the protestor to show error. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). Therefore, V-Soft has failed to overcome the presumption of correctness. KRS 45A.280. V-Soft has not established prejudice. For these reasons, this ground of protest is without merit.



**B. "V-Soft has received 100 points against possible 1000 points available for Oral Presentations."**

It is the burden of the protestor to show error. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). V-Soft has failed to show that its score was arbitrary, capricious, or contrary to law. V-Soft has not established prejudice. For these reasons, this ground of protest is without merit.

**C. "Scoring was based on factors that are not part of the selection criteria."**

V-Soft further alleges "It was not a requirement to have a Contract Manager prior to Vendor selection. This was taken in to consideration during evaluation. V-Soft did stress during Oral Presentation that we have a Contract Manager that will be assigned to Commonwealth account upon receipt of the award."

"It is a fundamental principle of federal procurement that offerors must be treated equally and provided with a common basis for the preparation of their proposals." *Matter of: Arthur Young & Company*, 85-1 CPD ¶598 (Comp.Gen 1985). But the protestor has the burden to show that the agency's actions were either without a reasonable basis or in violation of applicable procurement law. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). V-Soft has not made such a showing.

In addition, V-Soft has not shown how this affected scoring. Therefore, V-Soft has failed to overcome the presumption of correctness. KRS 45A.280. V-Soft has failed to show that the contract awards were arbitrary, capricious, or contrary to law. V-Soft has not established prejudice. For these reasons, this ground of protest is without merit.

**D. "Comments made like "Not Big Enough" in the scoring sheet gives an indication that size of the firm was given more consideration though V-Soft has more than 200 employee limit that was established for this RFP. The size beyond the required minimum was part of the criteria for this RFP."**

It is the burden of the protestor to show error. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protestor must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protestor's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988).

V-Soft has failed to overcome the presumption of correctness. KRS 45A.280. Further, V-Soft has failed to show that the contract awards were arbitrary, capricious, or contrary to law. V-Soft has not established prejudice. For these reasons, this ground of protest is without merit.

**E. "All awardees' prices were higher than V-Soft's."**

It is the burden of the protestor to show error. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771,

779 (Fed.Cl. 1997). The protester must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protester's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988). V-Soft has failed to show that the contract awards were arbitrary, capricious, or contrary to law. V-Soft has not established prejudice. For these reasons, this ground of protest is without merit.

**F. "Commonwealth scored V-Soft's response based on size though V-Soft has exceeded the size limitation to qualify."**

It is the burden of the protestor to show error. *See GraphicData, LLC v. United States*, 37 Fed.Cl. 771, 779 (Fed.Cl. 1997). The protester must clearly establish that a solicitation evaluation was irrational. This is not accomplished by the protester's mere disagreement with the agency's judgment. *Systems & Processes Engineering Corp.*, 88-2 CPD ¶478 (Comp.Gen 1988).

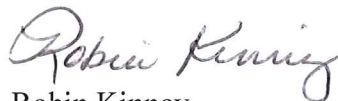
V-Soft has failed to provide any evidence to support its allegations. Therefore, V-Soft has failed to overcome the presumption of correctness. KRS 45A.280. Further, V-Soft has failed to show that the contract awards were arbitrary, capricious, or contrary to law. V-Soft has not established prejudice. For these reasons, this ground of protest is without merit.

Accordingly, upon review of the record, V-Soft has failed to overcome the presumption of correctness provided by KRS 45A.280. V-Soft has also failed to establish prejudice. The protest, therefore, must be **DENIED**. Pursuant to KRS 45A.280:

The decision of any official, board, agent, or other person appointed by the Commonwealth concerning any controversy arising under, or in connection with, the solicitation or award of a contract, shall be entitled to a presumption of correctness and shall not be disturbed unless the decision was procured by fraud or the findings of fact by such official, board, agent or other person do not support the decision.

In accordance with KRS 45A.285 (4), the decision by Finance Cabinet shall be final and conclusive.

For the Secretary  
Finance and Administration Cabinet  
By Designation



Robin Kinney  
Executive Director  
Office of Administrative Services

cc: Don Speer, OPS